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K. Goddard

John Goddart *Admin-
istrator of Ursula
Goddart who was
Administratrix of*
Robert Goddart her
late Husband de-
ceased,

APPELLT. Sir John Swin-
ton Baronet, } RPES^r.

The RESPONDENT'S CASE.

Ursula Goddart brought an Action before the Lords of Session in Scotland June 1700. against the Respondent for 404*l.* Sterling, and Interest since the Day of February 1680, due to her as Administratrix to Robert Goddart by the Respondent, who had been before that time (as the said Ursula Goddart pretended) appointed Cashier for the said Robert Goddart, and others in Company with him, by virtue of Articles of Co-partnership pretended to be executed by her said Husband, the Respondent, and others; whereby he had received several Sums of Money belonging to the said Robert Goddart without ever accounting for the same; for which said Sum of 404*l.* the said Ursula had the Day of February 1680. obtained a Judgment of the Court of King's Bench in Westminster against the Respondent; but in regard the said Respondent lived in Scotland, she brought her Action to have the Lords of Session sustain this Judgment or the Court of King's Bench as *Res Judicata*, and a solemn Judgment of another Sovereign Nation; and that the said Lords would interpose their Authority, and direct Execution thereupon against the Respondent and his Estate, and ordain him to pay the Sum adjudged with Interest, and the said Ursula at the same time did exhibit and produce a pretended Original of the said Articles.

That before any Determination of this matter the said Ursula died, whereby the Proceedings abated, but were revived by the Appellant as her Administrator.

That the Respondent having appeared to the said Action, the first Question before the Court of Session was, Whether the Judgment of the King's Bench was *Probatio Probata*, or to be consider'd by them as *Res Judicata*; for if it were not, the Appellant ought to prove the Co-partnership, and that the deceased Robert Goddart was a Co-partner, and signed and executed the Articles, and that the Respondent was Cashier, and that as such he had received Effects, whereof Goddart's Share amounted to the Sum in question.

The Appellant, to avoid the Decision of this Point, insisted, that the Respondent having given Bail to the Action in the King's Bench, and Judgment being given against him, his Bail offered to surrender him, but the said Ursula the 28th of February 1680. released the Bail, and obliged the Respondent to sign a Declaration on the Back of the said Release, importing that it was thereby agreed by all the Parties concerned, That no Clause or Expression therein mentioned was intended to release or discharge the Judgment; nor was it intended to preclude the said Ursula Goddart from obtaining any Advantage upon the said Judgment against the said John Swinton. And the Appellant pleaded that the Respondent had thereby homologated the Judgment, and could not be allowed to question it, but ought to submit thereto.

This

This point being insisted on as prejudicial or previously to be determined, the Lords of Session by their Interloquitor the 13th of July 1709 found that the said Declaration by the Respondent homologated and excluded all Objections against the Judgment, to which their Lordships adhered upon the 26th of the said Month: But upon a Petition stating the Case, and the Decisions of that Court for an hundred Years past, the Court appointed a Re-hearing, and upon the Debate, by their Interloquitor the 13th of February 1711, found that the Declaration granted by the Respondent did not homologate and exclude Objections against the Judgment; and by another Interloquitor of the third of December 1713, the Court sustained the Judgment of the Court of King's Bench, the Appellant instructing that Goddart was Co-partner, and that Sir John was Cashier, and had Intromission to make him liable for Goddart's Proportion.

Against these two Interloquitors the Appellant has brought his Petition and Appeal, and prays the same may be reversed.

Object. 1. That the Declaration signed by the Respondent could be to no other purpose but that of homologating or approving of the Judgment of the King's Bench.

Answ. That the said Declaration was not a formal or direct Covenant or Deed of Consent, nor can import a Homologation of the Judgment of the King's Bench, because it was not made freely and voluntarily but *Metu Carceris*, the Respondent being then surrendered by his Bail, as appears from the express Words of the Release, in the Power of the said Ursula Goddart, and ready to be put in Gaol; and by the constant Practice of the Law of Scotland, agreeable to the Principles of the Civil Law, a Deed made even directly confirming any Judgment or Covenant in such a Case, could have been of no Force, unless the Justice and Equity of such Judgment or Covenant otherwise appeared to the Court; and it was upon Representation of Precedents, and a full Argument on that Subject, that the Lords of Session were brought to alter their first Sentiments, for *Nihil consensui*

Ulpianus Lex
116. de Reg.
Juris.

tam contrarium est quam vis atque metus: quem comprobare contra bonos mores est. That as this Deed was involuntary, so it was not at all to the purpose that the Appellant would have it; for the Respondent's Bail having surrendered him, at least agreed to surrender him, they insisted to be released; this the said Ursula agreed to, in Consideration of the Payment of five Shillings: but she being anxious to reserve to her the Benefit of the said Judgment against the Respondent, she obliged him to declare that the Release of his Bail was not intended to discharge the Judgment or any Advantage against the Respondent for Payment of the Debt: The Point in view was not to confirm the Judgment, but to declare what was the intent of the Release.

The Validity and Equity of this Judgment depends upon this Point amongst others, *viz.* whether the said Robert Goddart was a Co-partner with the Respondent and others, and this Point the Respondent disputes, and says, Robert Goddart never signed these Articles: If this is the case tho' a Party may by Homologation supply any Defect of a Deed which depends upon himself only, yet no Deed of the Respondent's could have made Robert Goddart a Partner in the whole Stock without Consent of the whole Co-partners; upon which ground amongst others the Lords of Session pronounced the last Interloquitor of the 13th Day of February 1711 complained of.

Object. 2. The Judgment of the King's Bench ought in this Case to have been received as *Res Judicata*, or at least as *Probatio Probata*, because it was given upon Articles entered into at London when the Respondent resided and was a trading Merchant there.

Answ. 2. There is no Law nor Precedent binding or obliging the Sovereign Court of any Country to put in Execution the Decree or Sentence of any Court of another Country; and in the Year 1680, when the Judgment of the King's Bench was given, as well as in the Year 1700, when the Suit was commenced before the Court of Session, the Kingdom of Scotland was separate from that of England as much as any other Kingdom of Christendom; and even now after the Union it does remain still as distinct in all things that concern the Laws about Civil

Civil Right and the Limits and Extent of Jurisdiction by exprefs Stipulation, fo that the common governing Maxims *par in parem non habet Imperium vel Potestatem*, and that other *extra Territorium Jus dicenti impune non paretur*, must take Place as much as ever, and the Judgment of the King's Bench can no more take Place in *Scotland*, than those of the Lords of the Session can take Place in *England*.

But now suppose the Judgment of the King's Bench to have the same effect and force out of *England* as the Appellant pretends, yet the Interloquitor of the Session of the 3d of *December* 1713 is most just; for the Appellant did not insist only upon his Judgment, but likewise upon a Counterpart of the Articles of Co-partnership which he produced, whereby the whole Cause was by him submitted to the Judgment of the Court of Session; and if the Respondent had any thing to object against the said *Goddart* being a Partner, the Lords ought to have received it: Nay the Appellant did oftner than once, and even by supplication offer and desire Leave to make further Probation, and by his Reply insisted that *Goddart* his Father was Co-partner, and that the Respondent was Cashier and received his Effects.

It makes no Alteration that the Articles were in relation to English Business, executed in *England* by Persons residing there, because the Objection in this Case arises from the Separation of Jurisdiction, which is *Juris publici*, and the only Question is whether the Judgment of the King's Bench does bind the Lords of Session to proceed without enquiring into the Cause against a Person and his Goods in *Scotland*, which are under the Direction and Protection of the Law and Jurisdiction obtaining there.

Wherefore the Respondent humbly hopes the said Interloquitors complained of shall be affirmed, and the said Appellant dismissed with Costs.

DAVID DALRYMPLE.
J. JEKYLL.

John Goddard, Appellant.

Sir John Swinton, Respondent,
Baronet,

The Respondent's CASE.

To be heard at the Bar of the House
of Lords the
Day of Aug.
1715.

